IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16/09/2004

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MR.JUSTICE K.RAVIRAJA PANDIAN

W.P.NO.8827 of 2002
and W.P.Nos., 8838 and 8839 OF 2002

T.Stanes and Company Limited
B/23-24, Race Course Road
Coimbatore - 641 018 ... Petitioner in all
the Writ Petitions.

-Vs-

1. The Tamil Nadu Taxation Special
Tribunal, represented by the
Registrar,
Singaravelar Maaligai
Chennai - 600 001.

2. The State of Tamil Nadu
rep.by the Joint Commissioner III(CT)
Ezhilagam, Chepauk,
Chennai - 600 005

3. The Assistant Commissioner (C.T.)
Central Assessment Circle - I
Coimbatore - 641 018. .. Respondents in all
the writ petitions

Prayer: Writ Petitions filed under Article 226 of the Constitution of India for the relief of issuance of a writ of certiorari as stated therein.

For Petitioner : Mrs.Chitra Venkarataman
Sr. Counsel

For Respondents: Mr.B.Nedunchezhian,
Govt. Advocate (Taxes) for
RR2 and 3.

:ORDER
(Order of the Court was made by P.D.DINAKARAN, J,.)

1.1. These writ petitions are related to the assessment years 1990-9
1, 1991-92 and 1992-93 respectively, with respect to which the Joint Commissioner, the second respondent, exercising his suo motu revisional powers conferred under section 34 of the Tamil Nadu General Sales Tax Act (hereinafter referred to as "the Act"), by an order dated 17.11.1997 revised the order of the first Appellate Authority viz., Deputy Commissioner (CT) Appeal, Coimbatore, which is preferred by the assessee against the levy of penalty made by the Assistant Commissioner (CT) Central Assessment Circle, Coimbatore, the third respondent herein and restored the order of penalty made by the assessing authority under Section 22(2) of the Act.

1.2. Even though the said order dated 17.11.1997 of the second respondent was challenged by the petitioner/assessee before the Tribunal in T.C.Nos.147 to 149 of 1999, the Tribunal by a common order dated 7.2.2002 confirmed the orders of the second respondent/Joint Commissioner dated 17.11.1997, which necessitated the petitioner to prefer these writ petitions for issuance of a writ of certiorari to call for the records of the cases on the files of the first respondent in T.C. Nos.147 to 149 of 1999 relating to the assessment years 1990-91, 1991-9 2 and 1992-93 and quash the common order dated 7.2.2002 passed under Section 37 of the Act confirming the orders of the second respondent in S.M.R.Nos.116(A)/96, 115/96 and 116/96, all dated 17.11.1997 respectively relating to the assessment years 1990-91, 1991-92 and 1992-93 made under Section 34 of the Act.

2.1. In brief, the petitioner is an authorised dealer in chemical fertilizers, pesticides, footwear etc. According to the petitioner, he purchases the branded footwear from M/s Bata India Limited from their wholesale depots inside the State of Tamil Nadu. The assessee paid tax at the first point of sale and claimed second sale exemption, however charged 8 percent as "service charges" to recoup the tax paid on to the first seller.

2.2. Even though the assessing authority, the third respondent herein, after due notice under Section 22(1) of the Act assessed the transactions made by the assessee by orders dated 15.11.1993, 15.3.1994 and 30.3.1994 with respect to the assessment years 1990-91, 1991-92 and 1992-93 respectively and levied penalty of Rs.49,43,045/- for 1990-91, Rs.53,16,867/- for 1991-92 and Rs.48,26,025/- for 1992-93 under Section 22(2) overruling the objections made by the petitioner to the effect that the assessee adopted the uniform basic price throughout the State, and that the collection of "service charges" is permissible as the same is intended only to recoup sales tax suffered in the first point and consequently Section 22 of the Act is not attracted and the levy of penalty therefore is not warranted, the appellate authority viz., the second respondent reversed the same, which necessitated the revisional authority to take a suo motu revision under Section 34 of the Act and by an order dated 17.11.1997 to reject the case of the assessee/petitioner, by restoring the levy of penalty holding that (i) the recoupment of sales tax as contended in the name of "service charges" is totally foreign to the provisions of the Act and consequently, (ii) the levy of penalty is attracted under Section 22(2) of the Act to the extent the petitioner collected as service charges.

2.3. Against the said orders of the second respondent/ revisional authority dated 17.11.1997, appeals were preferred before the Tribunal, who confirmed the orders of the revisional authority by a common order dated 7.2.2002, which is impugned in the above writ petitions.

3.1. Learned counsel appearing for the petitioner placing reliance on a decision of this Court in METAL SALES CORPORATION VS. JOINT COMMERCIAL TAX OFFICER, HARBOUR III ASSESSMENT CIRCLE, (1983) 52 STC 392 contends that what was collected from the customers as "service charges" or otherwise, is nothing but recoupment of sales tax, which the petitioner already suffered, and therefore, any collection of tax in respect of such transaction cannot be regarded as a collection in contravention of either Section 22(1) of the Act or Rule 24(16)(ii) of the Tamil Nadu General Sales Tax Rules,1959. Relying on the said decision, she further submits that the recoupment of sales tax must be held to be permissible to the extent the assessee paid sales tax in the first point of sale.

4. Per contra, learned Government Pleader placing reliance on a decision of this Court in the case of STEEL SALES ORGANISATION VS. STATE OF TAMIL NADU, (1993) 90 STC 243 contends that where the dealer collected amounts from customers by way of sales tax or purporting to be by way of tax, to that extent, he was not authorised to collect such amount and therefore such collection of amount is forbidden under Section 22(1) of the Act and therefore penalty imposed under Section 22(2) of the Act is justified in law.

5. We have given careful consideration to the submissions made by either side.

6.1. It is a settled law that the penalty imposed under Section 22(2) of the Act was not for non-payment of collections into the Government treasury, but for collections by way of tax from transactions not liable to tax. Therefore, if the collection of tax was on a transaction which is liable to tax under the Act, such collection could not be said to be in contravention of Section 22(1) of the Act or Rule 24(16)(ii) of the Rules, vide Metal Sales Corporation case, (1983) 52 STC 392. In the said case, the fact remained that the taxing authorities have not clearly determined in terms of rupees and paise, by how much the second seller have over charged their purchaser in the matter of recoupment of tax on first sale and it was argued by the revenue that not that the collection of excess alone was an act that rendered the second seller liable for penalty, but that the penalty attaches under Section 22(1) of the Act for the entire amount collected. It was only in such context, this Court, while upholding the constitutional validity of the Act, held that such penalty could not be sustained until the basis therefor is clearly stated and clearly established and further held that whether one called that collection as ' recoupment' or 'reimbursement' or a 'plusage' or by any other name, such collection only relates to the transaction which was strictly taxable under the Act and therefore any collection of tax in respect of such transaction could not be regarded as a collection in contravention of Section 22(1) of the Act or Rule 24(16)(ii) of the Rules, 1959 and hence penalty could not be levied for such collection.

6.2. In Speed Away Limited case, (1997) 106 STC 367, where the assessee challenged the penalty imposed under Section 22(2) of the Act on the sum collected in the name of 'handling charges', this Court rejected the contention of the assessee that the collection of 'handling charges' is not attracted under Section 22(1) of the Act and held that the said amount collected in the name of 'handling charges' had been collected only by way of tax or purporting to be by way of tax attracting Section 22(1) of the Act and sustained the penalty imposed under Section 22(2) of the Act.

6.3. Again in Swastik Household and Industrial Products case, (1997) 106 STC 372, the contention of the assessee that the sum collected from the customers in the name of 'incidental charges' to recoup the tax paid on purchase will not attract Section 22(1) of the Act for the purpose of levying penalty under Section 22(2) of the Act, was rejected by this Court, as such collection of amounts from purchasers had been made only by way of tax or purporting to be by way of tax.

6.4. In Steel Sales Organisation case, (1993) 90 STC 243, this Court again held that the unauthorised collection of amounts even in the name of 'sales tax recoupment' is not permissible to escape from penalty under Section 22(1) of the Act, inasmuch as the dealer had contravened the provisions of Section 22(1) of the Act by collecting amounts "purporting" to be by way of tax, and rendered himself liable for penalty under Section 22(2) of the Act and that since the dealer had knowingly retained the amount which had been collected in contravention of Section 22(1) of the Act, there was no justification for reduction of penalty.

6.5. But, in the instant case, as in the case of Speed Away Limited, as well as in Swastik Corporation case, but unlike in Metal Sales Corporation's case, the revenue has imposed the impugned penalty after clearly stating and establishing the excess amount collected by the assessee in the name of 'service charges' treating the same that the petitioner collected the said 'service charges' from the customers purporting to be by way of tax in order to recoup the sales tax he suffered in the first sale even though he was not authorised to collect such amount under Section 22(1) of the Act.

6.6. In fine, if any amount is collected by a dealer from the customers in excess by way of sales tax or purporting to be by way of tax, to the extent he was not authorised to collect, such amount whether in the name of 'service charges', ' handling charges', 'incidental charges' or 'recoupment of sales tax', is forbidden under Section 22(1) of the Act, attracting levy of penalty under Section 22(2) of the Act.

6.7. Therefore, finding that it is difficult to follow the ratio laid down in METAL SALES CORPORATION VS. JOINT COMMERCIAL TAX OFFICER, HARBOUR III ASSESSMENT CIRCLE, (1983) 52 STC 392, where the revenue has not clearly stated and established the excess amount collected by the dealers, and following the decision in Swastik Household and Industrial Products case, (1997) 106 STC 372, Speed Away Limited case, (1997) 106 STC 367, and Steel Sales Organisation case, (1993) 90 STC 243, these writ petitions are dismissed. No costs.

Index : Yes
Internet: Yes

usk/kst

To:

1. The Commercial Tax Officer
Porur Assessment circle
No.3, Arcot Road, Alwarthirunagar,
Chennai - 600 087

2. The Principal Commissioner and
Commissioner of Commercial
Taxes,Department of Commercial Taxes,
Government of Tamil Nadu,
Ezhilagam, Chepauk,Chennai - 600 005

3. The Registrar
Tamil Nadu Taxation Special Tribunal,
Second Floor
Singaravelar Maaligai
Chennai - 600 001.